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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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SYLVIA R.,

Petitioner,

v.

SUPERIOR COURT OF SAN JOAQUIN COUNTY,

Respondent;

SAN JOAQUIN COUNTY HUMAN SERVICES  
AGENCY,

Real Party in Interest.

C045170

(Super. Ct. No. J02471)

Petitioner Sylvia R., mother of the minors, seeks an extraordinary writ (Cal. Rules of Court, rule 39.1B)<sup>1</sup> to vacate the orders of the juvenile court made at the contested dispositional hearing on the supplemental petition (Welf. &

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<sup>1</sup> Further rule references are to the California Rules of Court.

Inst. Code, § 387)<sup>2</sup> terminating her reunification services and setting a section 366.26 hearing. Petitioner also requests a stay of proceedings in the respondent court. For reasons that follow, we shall issue a peremptory writ of mandate directing the juvenile court to vacate the dispositional orders of the supplemental petition and the order setting a section 366.26 hearing and to set a new hearing for which the Standing Rock Sioux Tribe has been given proper notice pursuant to the Indian Child Welfare Act (ICWA or the Act). (25 U.S.C. § 1901 et seq.) The request for stay is denied as moot.

The San Joaquin County Human Services Agency (HSA) removed minors A. R., M. R., and E. R. (the minors) from petitioner's care due to petitioner's substance abuse and neglect. Petitioner is a member of the Standing Rock Sioux Tribe and notice of the dependency proceedings was sent to the tribe in September 2001. The tribe did not respond.

In December 2002, the minors were returned to petitioner's care but were again removed in April 2003, pursuant to a section 387 supplemental petition, due to petitioner's renewed substance abuse. Petitioner admitted the allegations of the section 387 petition and the court set a dispositional hearing.

The dispositional report for the section 387 petition recommended foster placement for the minors and termination of reunification services. The report stated that, in addition to

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<sup>2</sup> Further undesignated section references are to the Welfare and Institutions Code.

the original notification sent to the tribe in 2001, HSA sent a second letter on May 8, 2003, informing the tribe of the current proceedings. The letter stated that the minors had again been detained and that it was questionable whether they would be returned to petitioner or placed in guardianship. The letter did not provide notice of the hearing date and it is not clear when the tribe received it.

In September 2003, the Standing Rock Sioux Tribe responded that the minors, although not currently enrolled members of the tribe, were eligible for enrollment and asked if HSA needed enrollment applications for them. The tribe further stated that it intended to intervene in the proceedings.

The hearing, originally scheduled for May 21, 2003, was continued several times to October 6, 2003. HSA sent notice of the October 6, 2003, hearing by first-class mail to the tribe on September 29, 2003, only seven days prior to the hearing. The notice itself stated that the hearing was an 18-month review hearing rather than a dispositional hearing on a section 387 petition, and further stated the social worker did not recommend a change in placement custody or status of the minors. At the hearing, petitioner's counsel commented on the short notice period. The court found there had been compliance with the ICWA and adopted HSA's recommendations for foster care placement and termination of services.

#### **DISCUSSION**

Petitioner argues the petition should be granted because notice to the tribe of the dispositional hearing for the

section 387 petition did not comply with the 10-day rule of the ICWA, and the juvenile court erred in finding there had been compliance with the ICWA. Respondent argues the juvenile court correctly found there was compliance with the ICWA because the tribe was twice given notice of the proceedings, well in advance of the original date set for the section 387 dispositional hearing, and the hearing itself was not one which triggered additional notice. We are not persuaded by respondent's argument.

The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) Among the safeguards in the ICWA is the provision for notice, which requires: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . *No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe . . . .*" (25 U.S.C. § 1912(a), emphasis added; see also rule 1439(f).)

Notice under the ICWA has multiple aspects. The ICWA first requires that the tribe be noticed of the pendency of the proceedings and the right to intervene. Because the juvenile court generally does not know whether the child is a member of the tribe or eligible for membership, this initial notice is usually accompanied by an inquiry as to the child's status. (Rule 1439(d).) If the Act applies, the ICWA further requires that no foster care placement or termination of parental rights proceeding can be held until at least 10 days after the tribe has received notice. (25 U.S.C. § 1912(a).) Since the court generally will not be able to determine whether the ICWA applies until after the tribe has had an opportunity to respond to the initial notice of the pendency of the proceedings, subsequent hearings that fall within the provisions of the ICWA must be noticed according to the Act, i.e., by registered or certified mail with return receipt, and with sufficient time to allow the 10-day period to run. (Rule 1439(f)(1), (h).) The tribe must be given notice of all hearings until a determination of the minor's Indian status is made. (Rule 1439(f)(5).)

We agree with respondent that the tribe had ample notice of the pendency of the proceeding and the right to intervene. The tribe responded that the minors were eligible for membership and it was interested in intervention. Accordingly, the ICWA applied and the juvenile court and HSA were required to comply with its provisions. This meant that the dispositional hearing for the section 387 petition could not occur without proper ICWA notice.

Respondent argues that the hearing was not one involving foster care placement. We disagree. The minors were placed in foster care only under the emergency orders entered at the detention hearing on the section 387 petition. As the social worker's letter to the tribe indicated, placement options were still open. The dispositional hearing recommendations contemplated placement in foster care. Thus, the court could not proceed with the hearing until at least 10 days after the tribe received notice of the hearing.

Here, notice of the dispositional hearing was sent, but it did not comply with the ICWA time directives. Failure to comply with the notice provisions of the ICWA is prejudicial error. (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110-111; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 471-472; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424.) The notice of hearing that was sent does not constitute substantial compliance with the ICWA not only because it was sent within the 10-day waiting period, by ordinary mail, making it impossible to tell whether the tribe received the notice, but also because it was factually inaccurate. The tribe intended to intervene. The limited, erroneous notice made it difficult or impossible for the tribe to do so prior to the hearing.

#### **DISPOSITION**

The petition for extraordinary writ is granted. Let a peremptory writ of mandate issue directing the respondent court (1) to vacate its findings and orders entered on October 6, 2003, regarding disposition of the supplemental petition and

setting the section 366.26 hearing; (2) to set a new dispositional hearing; and (3) to require the HSA to provide timely notice according to the provisions of the ICWA to the Standing Rock Sioux Tribe. No dispositional hearing shall occur prior to 10 days following the tribe's receipt of the notice of hearing. If, after proper notice, the tribe does not appear and assert a position in the case, the respondent court is directed to reinstate the prior findings and orders of disposition and the order setting the section 366.26 hearing, resetting that hearing to a new date if necessary.

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DAVIS, Acting P.J.

We concur:

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RAYE, J.

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BUTZ, J.